No. 10,271

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION DISTRICT,

Appellant,

vs.

J. R. MASON,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

J. R. Mason, the appellee in this case, is a creditor of the Anderson-Cottonwood Irrigation District, holding bonds in the amount of $41,000 with unpaid interest from 1931. (R. 42 and R. 15, case No. 9951.) The appellant, a public agency, obtained an interlocutory decree declaring its plan of composition fair and reasonable. The plan provided for payment of thirty per cent of principal plus certain interest. (R. 46, 50, case No. 9951.)

Mr. Mason's appeal from the interlocutory decree was dismissed. (R. 2 and R. 202, case No. 9951.)

This decree in effect gave an option to the District to deposit its funds and thus be released from its

obligations under the old bond issues. These funds were deposited and a final decree to that effect obtained by the Court. (R. 3-9.) Mason appealed from the final decree. The final decree had a clause which provided (R. 7) that creditors' bonds must be deposited with the Registrar of the Court within a period of twelve months, which period would expire on July 9, 1942, or be forever barred from participating in the plan. Mason's appeal was decided against him. (126 Fed. (2d) 921, 63 S. Ct. 24.) Thereafter he petitioned the United States Supreme Court for a writ of certiorari (R. 21) and at that time applied to this Court for an order suspending the running of the 12 months' period in order to enable him to apply to the U. S. Supreme Court for a writ. This was granted. (R. 16.)

The U. S. Supreme Court denied the application for a writ, and Mason filed a petition for rehearing. (R. 21.) The Court went into recess, and it was not possible therefore to obtain a decision before the 1942 session of the Court in October. Being fearful of the possibility that the order of this Court suspending the running of the time might not be effective under these circumstances, Mason applied to the District Judge for an order suspending the running of the time. (R. 19.)

On July 1, 1942, Judge Welsh granted the motion and ordered suspension of that part of the decree: "It is further Ordered that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk

of this Court, instead of July 7th, 1942, as provided in the final decree." (R. 22.) This appeal is from that order.

A motion to amend a supersedeas order and to require the clerk below to pay appellee from the fund on deposit will also be considered by this Court with this appeal.

SUMMARY OF ARGUMENT.

Appellee will not in his reply brief follow precisely the outline of the argument in appellant's brief, but will divide his argument into four sections:

1. There is no merit in the appeal. Judge Welsh properly granted the order extending time.

2. The question presented is moot because of the order of Judge Healy extending the time for deposit of the bonds.

3. The appeal presents a moot question because Mason has already deposited his bonds within the period of time prescribed and motion of appellee should be granted.

4. The appeal was not properly taken and should be dismissed.

Appellant seeks to demonstrate that the order appealed from was not a stay authorized by Section 350, Title 28, U. S. C. A., but is a modification in substance of the decree which became final after appeal.

5. The appeal, and the proceeding in the Supreme Court for Writ of Certiorari extend the twelve months' time limit.

At page 17 of its brief, appellant says:

> "That is not a stay, or even a suspension of the decree. It is a plain change in one of its essential terms. It is in effect saying to this Court that the decree as affirmed contained a time limit that is too short and so it must be changed from July 7th to October 31st, notwithstanding that it has become the law of the case."

This position cannot be sustained. The decree said Mason must deposit the bonds within 12 months or be forever barred. (R. 7.) The Court's order *stayed* that provision. It said in effect that part of the decree is stayed for a reasonable period to permit Mason to apply for and obtain a writ of certiorari from the United States Supreme Court.

5. The appeal, and the proceeding in the Supreme Court for Writ of Certiorari extend the twelve months' time limit.

ARGUMENT.

I. THERE IS NO MERIT IN THE APPEAL. JUDGE WELSH PROPERLY GRANTED THE ORDER EXTENDING TIME.

Title 28, U. S. C., Section 350, gives specific authority to the District Court to stay for a reasonable time the execution and enforcement of a judgment "to enable the party aggrieved to apply for and obtain a writ of certiorari from the Supreme Court." The exact language is:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execu-

> tion and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

The burden of appellant's argument contained in pages 7 and 8 of his opening brief seems to be that the words in this statute "to apply for and obtain" imply that if the petitioner who seeks a writ of certiorari from the United States Supreme Court fails in his efforts to obtain a writ the decree becomes effective. By this, appellant means that if in the instant case, or any other case where running of time is involved, the time has run before the denial of the original petition for writ of certiorari, and the petitioner fails to obtain his writ, it then becomes too late to comply with the provisions of the decree and a forfeiture occurs. Appellant's argument applies equally to the original application for writ of certiorari as it does to an application for a rehearing.

One simple answer to this is that so interpreted, the statute is meaningless, because obviously if the

petitioner does obtain his writ and wins out in his case before the Supreme Court, he has the relief anyway. So it seems clear that the purpose of the statute is to enable the Supreme Court or the Court below (and not the intermediary Court of course) to stay the running of time or the enforcement of the decree to give the applicant the opportunity to demonstrate, if he can, errors in the decree.

Appellant has been able to produce no case which even hints the interpretation placed upon this statute by appellant.

In *Keyes v. U. S. Fidelity & Guaranty Co.*, 44 Fed. Sup. 723, it was held that stay of enforcement of the judgment of the District Court which had been affirmed by the Circuit Court of Appeals pending application for writ of certiorari could properly be made to the District Court.

This is a matter within the discretion of the judge. *Fidelity and Deposit Co. of Maryland v. Davis,* 127 Fed. (2d) 780.

The case of *In re Woods,* 143 U. S. 202, 12 S. Ct. 417, cited by appellant, does not seem to be in point, as that is a case in which the mandate of the Circuit Court was stayed to enable plaintiffs in error to apply to the Supreme Court for writ of certiorari.

What appellee has been concerned with has been the effect of the time provision in the final decree, should the final decree eventually be enforceable and be not set aside by the Supreme Court on the application for writ of certiorari and petition for rehearing thereof.

Simpkins Federal Practice, Revised Edition, 1934, Sec. 1036, states that where the petitioning party believed the issuance of the mandate or the execution or enforcement of the judgment would cause hardship while the application is being prepared or is pending, it is necessary for him to obtain a stay order as specifically provided in the statute, and refers to Title 28, Section 350.

It is good and proper practice to apply to the District Court for a stay of the proceedings on a mandate after the Supreme Court has denied the petition for writ of certiorari.

> "The Appellate Court is reluctant to stay the issuance of a mandate after petition for writ of certiorari has been denied. An application for stay of proceedings on the mandate may be made to the trial Court upon the filing of the mandate."
>
> *Manual of Federal Appellate Procedure,* 3rd Edition, 1941, O'Brien, page 239.

*Appellee believes Section 350 contains in its own language a complete answer to this appeal, for it is provided that the Judge of the District Court may make the stay conditional upon giving a bond, which may provide "that if the aggrieved party * * * fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other parties may sustain by reason of the stay." This shows quite clearly that Section 350 contemplates that a stay may be obtained for the benefit of the person who applies for but* FAILS TO OBTAIN *a writ of certiorari.*

It seems unnecessary to cite authority to show that a petition for rehearing of a petition for writ of certiorari is an application for writ of certiorari.

Rule 33 of the U. S. Supreme Court provides for petitions for rehearing.

Section 6 of Rule 38, Rules of the Supreme Court, provides:

> "Section 8 (d) of the Act of February 13, 1925 (28 U.S.C.A. Sec. 350), prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. (See Rule 36.)"

II. THE QUESTION PRESENTED IS MOOT BECAUSE OF THE ORDER OF JUDGE HEALY EXTENDING THE TIME FOR DEPOSIT OF THE BONDS.

Judge William Healy made an order on April 16, 1942, providing that the time of presentation of Mason's bonds to the registrar pursuant to the final decree be suspended for a period of 60 days after the U. S. Supreme Court shall have passed upon Mason's application for writ of certiorari. (R. 16.) It may well be that the question before this Court is moot on account of the order of Judge Healy, and that Mr. Mason had until 60 days after the denial of his petition for rehearing on his writ, which de-

nial was dated October 12, 1942, within which to deposit his bonds under Judge Healy's suspension of the 12 months' period. If that is so, then the appeal from the order of Judge Welsh extending Mason's time presents a moot question.

However, it can be seen that Mr. Mason could not rely upon the effect of Judge Healy's order since subsequently thereto the mandate of this Court was issued confirming the final decree. (R. 17.)

Consequently, appellee, as a proper precaution, applied to the Judge of the District Court for an order suspending the running of the time. It was a logical conclusion that the mandate having gone down in the Circuit Court, the matter was no longer pending there but was pending before the District Judge.

Furthermore, it does seem that it was better practice to obtain a new order from the District Judge in view of 28 U. S. C. A. Section 350.

III. THE APPEAL PRESENTS A MOOT QUESTION BECAUSE MASON HAS ALREADY DEPOSITED HIS BONDS WITHIN THE PERIOD OF TIME PRESCRIBED, AND THE MOTION OF APPELLEE TO MODIFY THE SUPERSEDEAS ORDER AND TO REQUIRE THE CLERK OF THE COURT BELOW TO PAY MASON SHOULD BE GRANTED.

This matter was presented to the Court on December 21, 1942, by motion. For convenience of the Court the motion, affidavit and points and authorities presented by movant are set forth in an appendix to this printed brief. (See appendix.)

The order of the Court provided that this motion would be considered by the Court simultaneously with this appeal.

Appellee presents one further authority on the question of alternative relief, namely, *U. S. v. Kales,* 62 S. Ct. 214, 314 U. S. 186, 86 L. Ed. ..... confirming 115 Fed. (2d) 497, a case in which it was held that the principle of alternative relief applies to a tax refund claim.

Briefly reviewing the argument on the motion:

(a) If the order suspending the running of the 12 months' period had never been made the deposit of Mason's bonds was good anyway.

(b) The supersedeas order goes further than a reversal of the order appealed from would have gone, for the order for supersedeas bond signed by Judge Welsh provided that "the Clerk of this Court be, and hereby is instructed not to pay any money on deposit in the Registry of this Court to any creditor of said district as provided in said Interlocutory Decree." Thus, Judge Welsh's order even suspends the operation of the interlocutory decree which became final months before the final decree was even signed. (R. 34.)

(c) The appeal taken by appellant from the order extending the time of deposit may not even decide the question presented by the motion as to whether the clerk should pay Mason.

(d) The order is restrospective.

(e) Mason's deposit was good under the rule permitting application for alternative relief.

(f) Mason deposited his bonds. He says: "Herewith there are deposited with you * * *." (R. 41.) He says: they "are being deposited with you now only by reason of the Final Decree herein requiring that said securities be deposited with you on or before July 7, 1942." (R. 43.) He merely says: "I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree." The final decree does not say the bonds must be deposited and also paid for before July 9, 1942.

The record does not show what has occurred subsequently, but I presume it will be undisputed that Mason has now sought payment since the denial of his petition for rehearing by the Supreme Court in the following communication:

"1920 Lake Street.
October 19, 1942.

In the *matter of Anderson-Cottonwood I.D. Debtor. No. 7,996.*

To the Honorable Clerk,
The District Court of the United States,
Sacramento, Cal.,

Dear sir:

Referring to my letter and deposit of certain bonds and coupons of the above named debtor with you, dated July 3, 1942 and your receipt of the same date, the Supreme Court of the United States having denied my petition for a rehearing in this matter on October 12, 1942, kindly accept this as your authority to deliver the bonds and coupons and surrender them to the debtor against their payment as provided in the plan of compo-

sion with funds deposited with you, remitting the settlement direct to me, at the above address.

It is my belief that any so-called 'missing' coupons from these bonds should not be deducted for from the composition figure, for the reason that they are in the possession of the debtor, and are therefore *not* unpaid. I request that you check this detail, before accepting any deduction on account of any so-called 'missing' coupons. Obviously any coupon which became due prior to July 1, 1937 and which is now in the possession of the debtor can not be 'appurtenant' to the bonds at the time of their delivery to you, no matter how the debtor came into their possession, or when. The same would apply regardless of the due date of any coupon, now in the possession of the debtor. I do not say that there may not be a few coupons for which the deduction set down in the plan should not be made, where the debtor denies that they are in its possession or under its control already.

The reservation about taking the money contained in my deposit with you of July 3, 1942 is now withdrawn, and prior to the date of October 31, 1942 contained in the order granting an extension of time in this case, signed by your Court on July 1, 1942. But no transfer of title to any of the bonds or coupons listed in your receipt is affected or consented to, until and unless payment therefor is received by me, as above.

Respectfully,

J. R. Mason."

The motion should be granted.

IV. THE APPEAL WAS NOT PROPERLY TAKEN AND SHOULD BE DISMISSED.

Section 24 of the Bankruptcy Act of 1938 seems on its face to be broad enough to permit any appeal of the type here taken.

However, it is submitted that this is a case for dismissal of the appeal. Section 24 was not intended to permit an appeal from an order of the type here given.

The principle reason urged is that the order below was discretionary, and that unless an abuse of discretion is shown, appeal will not lie.

We refer to the following cases:

Hoehn v. McIntosh, 110 Fed. (2d) 200.

The Court declared:

> "Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review."

So it has been held that an order to remove a referee is not appealable except for abuse of discretion. *Birch v. Steele,* 165 Fed. 577.

An order refusing to reopen an estate was not appealable. *Matter of Graff and Nevins,* 250 Fed. 997.

See also:

Woodford v. Cosden & Co., Inc., 289 Fed. 67;
Matter of Chotiner, 218 Fed. 813.

An order granting or denying a stay after adjudication under Section 11(a) was not appealable. *In re Lesser,* 99 Fed. 913.

And see generally *Collier on Bankruptcy,* 14th Ed., Sec. 24.39, Vol. 2, p. 788, where the author declares:

> "It seems evident that before even an interlocutory order is appealable it must have the character of a formal exercise of judicial power affecting the asserted rights of a party; that is, it must substantially determine some issue, or decide some step in the course of the proceeding."

(See, however, *Albin v. Cowing Pressure Relieving Joint Co.,* 63 Sup. Ct. 170.)

Of course, in a case where abuse of discretion is an issue, it may be said that the Court may determine the appeal or decide that there is no abuse of discretion and dismiss, but if there is no abuse of discretion, then it seems clear there is no jurisdiction to hear the appeal.

V. THE APPEAL, AND THE PROCEEDING IN THE SUPREME COURT FOR WRIT OF CERTIORARI, EXTEND THE TWELVE MONTHS' TIME LIMIT.

11 U. S. C. A. Section 403 (e) provides that when an appeal is taken from the interlocutory decree, if the decree prescribes a time within which any action is to be taken, the running of such time is suspended dur-

ing an appeal until final determination thereof. There is no such provision in the Municipal Bankruptcy Act as to any time prescribed by the final decree, but it would appear that the same principle should apply.

CONCLUSION.

The appellee, J. Rupert Mason, has been before this Court as an appellant in a considerable number of cases involving the Municipal Bankruptcy Act. It might be said that he has been a persistent litigator of the issues raised by this new legislation. Perhaps his persistence is easily understood since he has been one of the pioneers in developing irrigation in this state. It has been his chief life interest. He, through himself and his business associates, has secured the underwriting of approximately, if not more, than 50% of the original irrigation district bond issues issued by the various irrigation districts of this state. Preaching for a lifetime the indestructibility of those bonds. He naturally has sought to defend them, not for his own pecuniary gain but to sustain the principle upon which his life work was built.

In this case, however, he finds himself the appellee. It would seem that the appellant, representing as it does a portion of the great irrigation system of the State of California, being a public corporation representing public interests, should have been content with its decree compelling creditors to receive less than one-third on the dollar of their investment. Not so, however. This appellant is willing to go to

any lengths to prevent creditors from receiving anything. In this the R.F.C. joins heartily. Mr. Mason has been called a part of a recalcitrant minority, a shylock; all the names in the catalogue have been applied to him, and this appeal, no doubt, is a method of seeking to punish him for his persistence in upholding those constitutional principles in which he believes.

The appeal, however, seems totally without merit and it is respectfully submitted that it should be dismissed, and the Clerk of the Court required to pay Mr. Mason on his bonds and coupons pursuant to the interlocutory decree.

Dated, Turlock, California,
January 4, 1943.

Respectfully submitted,
PAUL A. MCCARTHY,
W. COBURN COOK,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

(Consisting of Movant's Papers on Motion to Amend "Order for Supersedeas Bond" and to Require Payment to Creditor.)

[Title of Court and Cause.]

MOTION.

J. R. Mason, appellee, moves this court for an order setting aside that part of the order of the District Court entitled "Order for Supersdeas Bond" which ordered the Clerk of the District Court not to pay any money on deposit in the registry of the court to any creditor of the district as provided in the interlocutory decree herein, and requiring the clerk to make the payment provided in the interlocutory decree to said J. R. Mason in accordance with the terms and provisions of said decree, or in the alternative remanding this cause to the District Court with instructions to consider and pass upon this motion.

This motion is based upon the annexed affidavit and the transcript of record herein. The annexed affidavit is referred to as setting forth the matters pertinent to this motion and the motion is made upon the ground that the rules of civil procedure for District Courts do not provide the relief or remedy obtained by the appellant in this cause, and upon the further ground that whether the order appealed from be affirmed or reversed, the decision of this court on the appeal will not and cannot reach the question or determine the question as to whether the said J. R. Mason is entitled to payment under the plan of composition by virtue and reason of the deposit of his

bonds made on July 3, 1942, with the registry of the lower court, but can only determine the question whether or not the lower court rightfully entered its order suspending the provisions of the final decree, and the determination of the appeal therefor will leave undecided all questions relating to the deposit of the securities by said J. R. Mason before the expiration of the 12 months period.

Dated, December 10, 1942.

Paul A. McCarthy,
W. Coburn Cook,
Attorneys for Appellee.

[Title of Court and Cause.]

NOTICE OF MOTION.

To Anderson-Cottonwood Irrigation District and to L. C. Smith and A. L. Cowell, Esquires, Its Attorneys:

You and each of you will please take notice that on Monday, the 21st day of December, 1942, at the hour of 10 o'clock a. m. of said day, at the court room of this court in the Post Office Building, San Francisco, California, appellee will make the foregoing motion.

Dated, December 10, 1942.

Paul A. McCarthy,
W. Coburn Cook,
Attorneys for Appellee.

[Title of Court and Cause.]

AFFIDAVIT OF J. R. MASON.

State of California,
City and County of San Francisco.—ss.

J. R. Mason, being duly sworn, says:

That he is appellee in the above entitled cause; that this is a municipal bankruptcy proceeding in which the District Court approved the plan of composition, which provided for certain payments to be made to the creditors of the district who were bondholders. (R. 2.)

That subsequently, on July 9, 1941, the District Court entered a final decree (R. 3, 10); that said final decree provided for the deposit of $24,799.14 with the registry of the court as disbursing agent to be distributed by the registrar for the purpose of taking up and retiring and refinancing in accordance with the plan of composition the remaining outstanding old obligations, and that such old obligations might be presented to the registrar for that purpose within the period of twelve months from the date thereof and provided further "that all such outstanding old obligations of the petitioning district which are not so presented to the registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this court;" (R. 7, 8.)

That affiant appealed from the final decree on August 7, 1941 (R. 14) and this Circuit Court of Appeals on March 21, 1942, affirmed the final decree.

That thereafter affiant obtained an order from this court suspending the running of the time for presentation of affiant's bonds to the registrar (R. 16) and in proper and due time filed a petition for writ of certiorari in the United States Supreme Court. That the Supreme Court denied a writ of certiorari on June 1st, 1942 (R. 17) and the mandate of this court was issued June 6, 1942. (R. 17.)

That thereafter and within the time allowed by law, affiant filed a petition for rehearing of said petition for a writ of certiorari in the United States Supreme Court, and this petition was subsequently on October 12, 1942, denied.

In the meantime, on June 29, 1942, affiant on motion obtained an order from the District Court suspending the running of the time for deposit of affiant's bonds until October 31, 1942. (R. 22.)

That the appellant in the above entitled cause took an appeal from the said order and such appeal is now pending.

That after filing notice of appeal the said appellant made an ex-parte application to the District Court for an order directing stay of proceedings pending the appeal (R. 31) and the court pursuant thereto granted an order for supersedeas bond (R. 33), which amongst other things provided that upon the giving of a bond in the amount of $17,300.00 "the Clerk of this Court be, and hereby is instructed not to pay any money on deposit in the registry of this Court to any creditor of said district as provided in said interlocutory decree." (R. 34.)

That affiant is the owner and holder and at all times herein has been such undisputed owner and holder of original bonds of said appellant in the amount of $41,000, with appurtenant interest coupons, and that prior to the expiration of the said 12 months period provided for the deposit of bonds in said final decree, which 12 months period expired on or about July 9, 1942, said affiant did on July 3, 1942, deposit all of said bonds with the registry of said court as provided in said final decree (R. 41), and received a receipt by the hand of the clerk of said court acknowledging receipt thereof. (R. 44.)

J. R. Mason.

Subscribed and sworn to before me this 10th day of November, 1942.

(Seal) Violet Neurenberg,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 31, 1942.

[Title of Court and Cause.]

POINTS AND AUTHORITIES ON MOTION.

STATEMENT.

This is a municipal bankruptcy proceeding in which the District Court approved the plan of composition which provided for certain payments to be made to the creditors who were bondholders. (R. 2.) J. R. Mason is appellee and one of the bondholders.

On July 9, 1941 the District Court entered a final decree. (R. 3, 10.) The final decree provided for the deposit of money with the registry of the court as disbursing agent to be distributed by the registrar to the creditors. This final decree had a provision that "all such outstanding old obligations * * * which are not so presented to the registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan or in the funds held in the registry of this Court;" (R. 7, 8.)

J. R. Mason appealed from the final decree and this court on March 21, affirmed the final decree.

Thereafter J. R. Mason obtained an order from this court suspending the running of the time for presentation of his bonds, pending application for a writ of certiorari in the United States Supreme Court. (R. 16.) The Supreme Court denied the petition on June 1st, 1942 (R. 17) and the mandate of this court was issued June 6, 1942. (R. 17.)

Within proper time J. R. Mason filed a petition for rehearing of his petition for writ of certiorari. This petition was filed in Washington after adjournment of the Supreme Court so that it was not passed upon until October 12, 1942, when it was denied.

Be it noted that 12 months from the signing of the final decree expired on or about July 7, 1942, so that J. R. Mason was naturally apprehensive that if he should fail in his petition for rehearing in the Supreme Court it might be construed that his time limit for depositing his bonds would have already expired, so on June 29, 1942, prior to the expiration of the

12 months, he obtained an order from the District Court suspending the running of the time for deposit of his bonds until October 31st, 1942. (R. 22.)

In the meantime, however, being apprehensive lest this procedure would fail, he took an alternative procedure under Rule 8 of Rules of Civil Procedure for District Courts and actually filed his bonds with the registrar of the court with a declaration which was in the alternative but which deposit he contends fully complied with the provisions of the final decree. (R. 41, 44.) This deposit was made with the clerk on July 3, 1942, and appellee contends that he is entitled to be paid because he had actually complied with the order of the court and deposited prior to July 7, 1942.

The Anderson-Cottonwood Irrigation District appealed from the order of the District Court suspending the running of the 12 months period. The notice of appeal was filed July 27, 1942, long after Mason deposited his bonds.

The District Court on application granted an order for supersedeas bond on September 21, 1942, in which order it was provided "that until said appeal is finally determined or dismissed, the clerk of this court be and hereby is instructed not to pay any money on deposit in the registry of this court to any creditor of said district as provided in said interlocutory decree."

Argument.

It is contended by movant, first, that the appeal in this case will not determine the question whether Mason deposited prior to the expiration of the 12

months period and is entitled on that account to disbursal of the funds as a creditor, regardless of the order of the District Court suspending the 12 months period, and secondly, that the supersedeas order exceeds the authority of the District Court and should be modified to permit Mason to collect his money upon the deposit made theretofore and prior to the expiration of the original 12 months period.

The test of this motion may be summarized as follows: Suppose the order from which the appeal was taken had not been made at all, would the clerk properly pay Mason the funds deposited?

Alternative Relief.

Rule 8 (a) and (e) (2) of Federal Rules of Civil Procedure provides for alternative and mutually exclusive remedies. In other words, alternative and exclusive remedies are recognized by this rule. Collier on Bankruptcy, 14th Ed., 1941, Vol. 3, page 156, suggests:

> "In order to prevent the proof of claim being treated as a final election of remedy, and also to provide against possible objections to a subsequent withdrawal of the proven claim, the latter should reserve the rights to the security and include a specific statement that the claim is filed only as an alternative to the primarily asserted security."

And cites Moore Federal Practice, Vol. 1, pages 556 to 558. Moore points out that rule 54 (c) makes it clear that the demand for judgment is no part of the claimant's cause of action.

Moore declares that Rule 8 (a) (3) applies to all pleadings in which a claim for affirmative relief is set forth.

There seems no reason why it should not apply to Mr. Mason's claim and deposit with the clerk which was in the alternative and filed before the expiration of the time limit. That seems to be exactly the procedure which was recommended by Mr. Collier in his work on bankruptcy.

A number of cases are collected together in Mr. Collier's work at page 156 which we will not cite at this time, except to refer to the case of Thomas v. Taggart, 209 U. S. 385, 28 S. Ct. 519, in which the Supreme Court declares:

> "We are of the opinion that in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy which now prevent his recovery of the certificates of stock in question."

In other words, alternative remedies are permitted in bankruptcy, and the nature of the case cited and the breadth of the rule indicates that it should be applied to the instant case.

At page 336, in the same volume, Collier further states:

> "As already discussed, the advisable procedure for the claimant is to file within the statutory period a proof of claim in which he points out that reclamation proceedings are pending, and that the proof of claim is merely designed to

preserve the rights that the claimant may have *in the event of his defeat in the reclamation proceeding.*"

Stay of proceedings has no retrospective operation. The supersedeas order was retrospective.

The stay is not retroactive and does not invalidate prior proceedings. Moore (1938), Vol. 3, page 3300, where under note 7 numerous authorities are cited.

Rule 62 (d) of Rules of Civil Procedure for District Courts only provides that the appellant, when an appeal is taken, may obtain a stay.

It is contended that the stay applies only to enforcement of the judgment itself.

The effect of a stay "is limited to enforcement of the judgment itself." 2 Cal. Jur. 473. Hence the action desired by appellee not proceeding from the order or judgment at all, cannot be stayed. The only stay proper was one which would apply to bonds deposited after the stay was obtained, or in any event after July 7, 1942 when the original 12 months period would have expired.

We do not here argue the merits of the case, which argument will attempt to show that the 12 months period could not take effect until the mandate came down and that Mason would have had 12 months from the filing of the mandate to deposit his bonds. But we do not here argue that point, relying upon the proposition that the stay contemplated by Rule 62 (d) could not affect the proceedings or action already taken and the effect thereof, namely payment to Mason.

At 2 Cal. Jur. 469 it is declared that a stay of proceedings pending an appeal has no retrospective operation and does not undo or render nugatory or unlawful any action that has already been had before the supersedeas became effective, citing Jacobs v. Superior Court, 133 Cal. 364, 65 Pac. 826.

It is not correct to say that a judgment is stayed—but only proceedings upon the judgment. (Idem page 470.) That, however, is not precisely the point, the precise point being that Mason did deposit before the expiration of the 12 months period, which he had a right to do even if the District Court had not made the order from which the appeal was taken.

The supersedeas order in effect goes further than reversing the order from which the appeal was taken because it declares that even if Mason deposited the bonds within the original 12 months period he still could not collect.

At 4 C. J. S., page 1151, it is declared that the general rule is that the stay extends only to the prevention of any process, act or proceeding in connection with the enforcement of the order appealed from.

It is respectfully contended that the motion should be granted.

Dated, Turlock, California,
December 10, 1942.

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